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AUG 4 1941
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 337-342

314-659

PRIME SECURITIES CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

MICHIGAN SILICA COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

GENERAL CHROMIUM CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

SENIOR INVESTMENT CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

UDYLITE COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

STANDARD COTTON PRODUCTS COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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The petitioners, by their attorney, pray that Writs of Certiorari issue to review the judgments of the United

States Circuit Court of Appeals for the Sixth Circuit entered in these cases on May 15, 1941, affirming the decisions of the District Court of the United States for the Eastern District of Michigan.

OPINIONS BELOW

The District Court did not file any opinion. The opinion of the Circuit Court of Appeals (R. at end) is recorded in 119 F. (2d) 939.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1941 (R. at end). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4 of the Constitution of the United States.

STATUTES INVOLVED

This will be found in the Appendix, *infra*, pp. 16-19.

STATEMENT

The facts as set out in the petitions, as amended, of each of the petitioners, and as admitted by respondent's demurrer (R. 19) are substantially as follows:

Prime Securities Corporation

Petitioner is a Michigan corporation, engaged in business of investing and trading in stocks and securities.

Petitioner's declared values for capital stock tax purposes during the years 1933 to 1938 showed variations from approximately $1,900,000.00 in 1933 to $2,400,000.00 in 1934 to $99,000.00 in 1937 (R. 20).

The declared value for the year 1933 was determined by the Secretary of the company and was based on its net worth as of December 31, 1932, using the market value of assets held. For the years 1934, 1936 and 1938, the declared value was determined upon an estimate of the maximum profits for those years (R. 23).

During the year, petitioner was called upon to pay off its bank loans to the extent of $2,263,950.00. In order to do this, petitioner was compelled to sell in the same year 83,850 shares of General Motors Corporation common stock. Using the corporate cost basis for said shares, or the market value at the time of acquisition, no excess-profits tax was due from petitioner. However, the Commissioner of Internal Revenue has taken the position that in determining the excess-profits tax liability of petitioner for 1933, the basis for said shares of stock is the cost of said stock to the transferors, and is claiming a deficiency of $57,020.10 of excess-profits tax (R. 20-21).

The petitioner's net worth according to its books of account and according to market value of assets at the close of each of the calendar years 1931 to 1938 is set out at page 22 of the record and shows large differences and fluctuations.

Petitioner's net income for the years 1931 to 1938 show wide fluctuations (R. 22). In 1931 there was a loss of about $7,500.00 and in 1933 the net taxable income was over $1,000,000.00. However, if the corporate cost of the securities sold in 1933 were used in determining net taxable income, the corporation incurred a loss of about $340,000.00.

Michigan Silica Company

Petitioner is a Michigan corporation engaged in the manufacture and sale of Silica. There were wide fluctuations in petitioner's earnings and net worth during the years 1929 to 1938 (R. 22).

General Chromium Corporation

Petitioner is a Delaware corporation, holding 50% of the outstanding capital stock of United Chromium, Inc., which latter corporation was the owner and holder of various patents pertaining to chromium plating. Petitioner's net sales, royalties and net taxable income, and also its net worth as per books during the years 1929 to 1938 show large fluctuations. In 1935 petitioner received its first dividends from United Chromium, Inc. in a total of $25,000.00. In 1936 petitioner received such dividends in a total of $132,500.00. During the latter part of 1936, one of the important patents of United Chromium, Inc., was declared invalid, and as a result thereof the earnings of

United Chromium, Inc. were greatly reduced and it was unable to pay and petitioner did not receive any dividends after 1936 (R. 22).

Senior Investment Corporation

Petitioner is a Michigan corporation engaged in investing and trading in stocks and securities. Petitioner's declared values for capital stock tax purposes during the years 1933 to 1938 show variations from $7,500,000.00 in 1933 to $1,000,000.00 in 1934 to $9,000,000.00 in 1936 (R. 20). At time of organization its outstanding and paid-in capital stock amounted to approximately $88,-000,000.00. In August of 1933, the petitioner was reorganized by a transfer of part of its assets to a Delaware corporation in exchange for all of the stock of such corporation. Immediately prior to such reorganization the total market value of its assets was approximately $27,-000,000.00 (R. 21). Petitioner's net taxable income for the years 1929 to 1938 show tremendous fluctuations, varying from approximately $9,000.00 in 1929 to $3,800,-000.00 in 1930 to a loss of $53,000.00 in 1932, and a net taxable income of $700,000.00 in 1936 (R. 22).

Udylite Company

Petitioner is an Indiana corporation engaged in the manufacture and distribution of equipment and supplies for the electro plating and polishing industry, and owning and holding patents and processes of electro plating. Petitioner's net worth according to its books and also its net sales, royalties and net taxable income for the calendar years 1929 to 1938 show wide fluctuations (R. 22).

Standard Cotton Products Company

Petitioner is a Michigan corporation engaged in the manufacture and sale of cotton batting and pads for automobile upholstering. Petitioner paid excess-profits taxes of $1,984.07 for the calendar year 1934, and $5,027.57 for the calendar year 1935 (R. 20). Petitioner's net worth according to its books and net sales, gross profit and net taxable income, for the years 1931 to 1938 show wide fluctuations (R. 21). If petitioner had not been permitted by subsequent statute to change its declaration of value in the year 1933 and 1934, it would have been liable for large amounts of excess-profits taxes (R. 22-23).

The petitioners filed timely claims for refund of the capital stock taxes sued for and upon rejections of said claims filed suit in the United States District Court for the recovery thereof.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In affirming the judgments of the District Court dismissing petitioners' suits.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in these cases has decided an important constitutional question which has not been, but should be settled by this Court.

2. There is great uncertainty as to what is the true nature of the capital stock tax. The government has taken contradictory positions in different cases.

a. In *Haggar Co. v. Helvering,* 308 U.S. 389, this Court stated the Government's contention as follows:

> "In making these contentions, the Commissioner concedes that the amount of the declared value of capital fixed for the first year is a matter of indifference to the Government since the statute leaves the taxpayer free to declare any amount which its fancy may choose • • • ."

b. In the Government's brief filed in the Circuit Court in the case of Prime Securities Corporation, petitioner herein, it is stated—"The taxpayer might have declared a reasonable value as Congress intended • • • ."

c. The decisions of the lower Courts are in conflict on this question. The larger number of cases passing on this question have held that the declared value need have no relationship to actual value. *Allied Agents, Inc. v. United States,* 26 Fed. Supp. 98; *Rochester Gas & Electric Corporation v. McGowan,* 115 Fed. (2d) 935 (CCA 2). A few other of such cases have held that the purpose of the Act is to impose a tax based on a fair and reasonable value of the stock. *Kentucky Fire Brick Co. v. Glenn,* 34 Fed.